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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-455

RESPONSE OF CAROLINA, INC.
and
DATATRON CORPORATION,
Petitioners,

against

LEASCO RESPONSE, INC., et al.
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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This Response to petitioners, Response of Carolina, Inc. ("Carolina") and Datatron Corporation ("Datatron") Petition for Writ of Certiorari is submitted by defendant Leasco Response, Inc. ("Leasco"). Other named defendants, bearing the appellation "John Doe," "Richard Roe," etc. have not been identified by petitioners or served with a summons, complaint or injunction.

QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN REVERSING THE DISTRICT COURT'S GRANT OF A PRELIMINARY INJUNCTION BARRING RESPONDENT FROM PROSECUTING ITS SUIT FOR SUMS DUE AND OWING IN THE NORTH CAROLINA STATE COURTS AND FROM INSTITUTING A SIMILAR SUIT IN THE KENTUCKY STATE COURT WHERE THE SUMS OWED WERE NOT ATTRIBUTABLE TO ANY ANTITRUST VIOLATION ALLEGED BY PETITIONERS.

STATEMENT OF THE CASE

A. PRIOR PROCEEDINGS

Carolina and Datatron are two of the ten franchisees of Leasco's computer time sharing services. They and Florida Computer Response, Inc. and Response of Colorado, Inc. brought suit in the United States District Court for the Southern District of Florida alleging various breach of contract, fraud and antitrust claims. Only the four franchisees named above have made claims or instituted suit against Leasco.

Each of these four franchises has been in default with respect to the franchise and computer agreements between themselves and Leasco for over two years. To collect the amounts owing for rent of computers and under the franchise agreements, by Carolina and Florida Computer

Response, Inc., Leasco has instituted suit in the North Carolina State Courts against Carolina and the United States District Court for the Southern District of Florida against Florida Computer Response, Inc.

The United States Court of Appeals for the Fifth Circuit vacated an injunction issued by the United States District Court for the Southern District of Florida barring prosecution of the North Carolina State Court action and from instituting an action against Datatron in the Kentucky State Courts. The injunction further enjoined Leasco from exercising its contractual and common law rights to repossess the computers leased by Leasco to Carolina and Datatron.

Petitioners' request for a rehearing by the Fifth Circuit was denied and petitioners did not identify any real conflict among the Circuit Courts pertaining to the issues before it and before this Court. Similarly, petitioners' request for a stay of the Fifth Circuit's mandate was denied on October 29, 1974.

Without waiting for the Fifth Circuit to rule on their request for a stay of the mandate, petitioners filed a petition for Writ of Certiorari with this Court on October 21, 1974, and filed with Associate Justice Powell of this Court a motion for recall of that mandate and application for a stay on October 30, 1974. On November 5, 1974, Justice Powell denied that motion.

B. THE OPINION OF THE FIFTH CIRCUIT

Central to the holding of the Fifth Circuit was its finding, after a thorough review of the record, that:

> "The substantial amounts owed Leasco by appellees are not argued to be monies due from appellees under the 70% clause for selling outside their territories of primary responsibility (territorial restraint), rather the record reflects that appellees terminated all payments. Neither the rentals on the leased computer hardware nor the maintenance costs nor the unchallenged 15% royalties were paid. The appellees contend that to dissolve the injunctions would allow Leasco to put them out of business. We note, however, that this situation is not one of a franchisor terminating a franchisee because of its failure to comply with the practices violative of the anti-trust law, nor that the alleged anti-trust violation so permeated the franchise agreement that to uphold any of its provisions would be to countenance and enforce an anti-trust violation." 498 F.2d at 320.

In light of that finding, the Court addressed petitioners' claim that the institution and prosecution of state court actions by Leasco to recover the substantial amounts due it should be enjoined because they could not assert a claim of violation of §1 of the Sherman Act, 15 U.S.C. §1, as a defense to those claims. The Court, after cogently reviewing the applicable law, ruled that to bar collection of the debt would put petitioners in the unique, enviable and unfair position of using Leasco's computer equipment

and enjoying the benefit of its services and computer programs without paying for them. The court held, 498 F.2d at 319-20:

> "There are two important reasons for narrowly construing, as the court did in *Helfenbein* [v. *International Industries, Inc.*, 438 F.2d 1068 (8th Cir. 1971)], the plea of illegality under the anti-trust laws. First, as stressed heavily by the Supreme Court in Bruce's Juices [v. American Can Co., 330 U.S. 743 (1947)] and Kelly [v. Kosuga, 358 U.S. 516 (1959)] the availability of such a defense allows contracting parties the benefits of a contract without having to tender consideration. In this case, Carolina and Datatron have accepted from Leasco the use of their computer hardware, their computer software, and their reputation and expertise, without payment. 'The Court has refrained from extending judicial sanction to the avoidance of private contracts where to do so is unnecessary. See Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-757, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947); D. R. Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U.S. 165, 35 S.Ct. 398, 59 L.Ed. 520 (1915); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1902).' Dickstein v. DuPont, *supra*, 443 F.2d at 786. Second, the policy expressed in *Bruce's Juices* and applied in *Kelly*, denoted that the enumerated statutory remedies in the anti-trust law do not provide for or require such a broad anti-trust defense to contract actions. To allow the appellees to obtain free goods and services from Leasco as

> a compensatory measure in the state court and, additionally, to award triple damages in the federal anti-trust suit would exceed the redress established by the anti-trust statute. 330 U.S. at 756-757, 67 S.Ct. 1015."

And as the Fifth Circuit also found, to continue a situation such as this would directly controvert:

> "the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' " 498 F.2d at 318.

Noteworthy is the fact that nowhere in their Petition do petitioners claim that the action before the North Carolina State Courts is a sham or instituted for purposes of delay. Instead they claim (*E.g.* Pet. pp 8-9) that if they have to pay their debts — debts which are not attributable to the purported antitrust violations — they will be irreparably harmed and forced to go out of business. In their Motion for Recall of the Mandate and Application for a Stay before Justice Powell, petitioners stated:

> "5. *The irreparable injury to petitioners.* Should the injunctions be dissolved, petitioners' businesses, as more fully set forth in the Petition, will have been destroyed and terminated. Once they are destroyed they cannot be put back together again. . . .
>
> 6. The respondent Leasco Response has, on Tuesday, October 29, 1974, before the United States

> Court of Appeals has issued its mandate, sent telegrams to the petitioners informing them that Leasco would take such measures as to cause the destruction of their businesses. Once the injunctions are dissolved the injury to the petitioners will be irreparable."

This claim is deceptive. Annexed hereto as Appendix I is a copy of the telegram sent to Carolina. That telegram is identical to the one sent to Datatron and provides, in full:

> "We understand the Appellate Court is issuing its mandate which makes final its opinion reversing the trial court injunction. Accordingly, we are proceeding to repossess our equipment by reason of your failures and refusal to pay your past debts to Leasco. All support and maintenance will likewise cease at once. However, if you desire to retain custody of the equipment pending the outcome of the trial in Federal Court in Miami, we are willing to postpone any repossession and to continue supporting you until the jury determines the merits of our claims provided that you pay in the court registry the amounts Leasco is owed per its billings to you and the terms of the contract between us and to remain current. If you wish to discuss this matter at all, we are at your disposal.* Leasco Response Inc. Leonard J. Pernick, President."

Carolina and Datatron, therefore, will suffer no irreparable harm if the injunction is dissolved since they need

*Despite Leasco's offer to discuss this issue, not a word has been heard from Carolina or Datatron.

only pay the money due Leasco into the Court registry to avoid repossession by Leasco of its computers and related equipment pending the outcome of the trial in the Miami District Court. If they prevail at trial, they will be protected and the District Court will be able to return to them the sums they are entitled to, if any.

Moreover, through payment of the amounts they owe, Carolina and Datatron will obtain the support and maintenance benefits of the contracts they breached through failure to make the required payments and which they assert are illegal. Thus, their business will not be destroyed pending trial.

In contrast, should the injunction continue, the harm to Leasco is severe. Petitioners would have this Court put Leasco in the impossible position of having to comply with contracts that the petitioners claim are illegal while petitioners fail to make the payments called for by these contracts for the services and use of the equipment those contracts entail. Petitioners would prefer to challenge the contracts on the one hand and reap their benefits on the other — a situation manifestly unjust.

SUMMARY OF ARGUMENT

The Petition for Certiorari should not be granted because it presents neither a substantial federal question nor an actual conflict among the various Circuit Courts, because the Fifth Circuit's holding was fully consistent with prior decisions of this Court, because the action before the North Carolina State Courts was not a "sham" and because to continue with the injunctions would work substantial injustice.

ARGUMENT

POINT I

CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS CASE PRESENTS NO SUBTANTIAL FEDERAL QUESTIONS AND NO CONFLICT AMONG THE CIRCUITS OR WITH THE DECISIONS OF THIS COURT.

Examination of the Fifth Circuit's opinion shows a careful and cogent analysis of existing law and policy and a careful concern for avoiding trespass on State Court jurisdiction.

Petitioners attempt to justify their petition by arguing the standard contentions: that the case presents an important federal question; that the Fifth Circuit acted in conflict with applicable decisions of this Court; and that this case presents a situation in which the Circuits are in conflict. These are easily dispensed with.

First, they argue that the important federal question presented here is whether injunctive relief in antitrust actions is limited to the standards of 15 U.S.C. §26 or may also be applied pursuant to the All Writs Act, 28 U.S.C. §1651. This contention misstates the issue.

No substantial federal question is presented here by the availability of the All Writs Act as a statutory grant of power providing that federal courts of appropriate jurisdiction "may issue" injunctions in aid of that jurisdiction "and agreeable to the usages and principles of law." 28 U.S.C. §1651. The All Writs Act dates from the Judiciary Act of 1789. 9 Moore's *Fed. Pract.* §110.26 at 277-8 (1970). By use of the word "may" in the All Writs Act, Congress

entrusted the proper exercise of the issuance of writs to the discretion of the Court and Congress, in enacting 15 U.S.C. §26 over a hundred years later as part of the antitrust laws was obviously specifying the standards applicable to such discretion by which "a preliminary injunction may issue". 15 U.S.C. §26.

In *United States v. FMC Corporation et ano*, ____U.S.____, 84 S.Ct. 4, 8 (1963), Justice Goldberg of this Court held that the All Writs Act did not override the specific standards of Enabling Act, 15 U.S.C. §28, 29. He noted that Congress, in enacting the Enabling Act set forth the standards to be applied in questions arising in the limited area by the Enabling Act notwithstanding the open ended provisions of the All Writs Act. Here the same considerations obtain. Congress, in 15 U.S.C. §26, has legislated in the specific area of the use of injunctive relief in antitrust actions and set forth the standards applicable thereto.

Thus, where the All Writs Act, on its face, states that federal courts may issue "all writs necessary *or appropriate* in aid of their respective jurisdictions and *agreeable to the usages and principles of law.*" (Emphasis supplied). This language is but another way of stating that the courts are to apply principles of law in exercising their discretion — principles which are contained in 15 U.S.C. §26 as interpreted by the courts. The question of appropriate grant of certiorari turns, therefore, not on the availability of the All Writs Act, but on the application of law.

Second, the Fifth Circuit's opinion was consistent with this Court's holdings in *Kelly v. Kosuga*, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959) and *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed.

1219 (1947). Petitioners do not argue that the Fifth Circuit incorrectly relied on or interpreed *Kelly v. Kosuga, supra* and that omission should be dispositive of their Petition for Certiorari. This Court in *Kelly* ruled, 358 U.S. 520-1, that:

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it."

Here, to forbid the State Courts of North Carolina and Kentucky from determining whether Leasco may repossess its equipment due to petitioners' defaults, where those defaults have nothing to do with the alleged antitrust claim, would permit the petitioners to get Leasco's property for nothing when they purport to be leasing it.

To the same effect is *Bruce's Juices*. There, this Court held that even were it assumed that a pricing structure violated the Robinson-Patman Act, that defense could not be asserted in an action to collect overdue bills based on that pricing structure as to do so would permit the buyer to acquire his goods for nothing. 330 U.S. 752.

Petitioners attempt, Pet. p. 11, to distinguish *Bruce's Juices* on the tangential ground that permitting the antitrust defense there would have foreclosed Plaintiff from litigating the debts in question and that, in their view, the result would merely affect Plaintiff's profit. These contentions have no merit. The Court in *Bruce's Juices* was

rightfully concerned with over-zealous application of antitrust defenses to pure and simple cases based on failure to pay overdue debts. It rationalized that the victim of an antitrust violation could bring his own action for damages unless the violation and the default were so intertwined so as to put the Court in the position of enforcing an antitrust violation. Here, the payments owed by petitioners to Leasco, as the Fifth Circuit noted, are separate and distinct from the alleged violation. Given that finding of fact, the Fifth Circuit would have committed reversible error had it ruled other than it did.

Third, there is no conflict between the Circuits. As evidence of the purported conflict, petitioners cite one case, *Milsen Co. v. Southland Corp.*, 454 F.2d 363 (7th Cir. 1971). They ignore that the Fifth Circuit cited 498 F.2d at 317-20, cases from the Second, Third and Eighth Circuits. Moreover, *Milsen*, as the Fifth Circuit noted, is hardly inconsistent with the holding here. Here, the antitrust issue petitioners presented to the Fifth Circuit is their allegation that Leasco restrained trade through a territorial allocation whereby each of its franchises had an exclusive franchise area.

The franchise fee was 15% of revenues generated within the territory and 70% of revenues generated outside the territory. Leasco has not billed petitioners or any other franchise the 70% charge for sales outside the territory, and the defaults in issue relate not to failures to pay the 70% charge, but through failure to pay other charges. As found by the Fifth Circuit, the defaults do not relate to the alleged antitrust violations.

In *Milsen*, the Court found, 454 F.2d at 367-8 that the default there was a default in paying a franchise fee based on practices prohibited by the antitrust laws, that "Plaintiffs here will lose their stores if they refuse to cooperate with defendants' anticompetitive practices" and "most important, if a court allows defendants to collect the franchise fees or terminate the franchises, it must in effect approve the possible antitrust violations." That, as the Fifth Circuit held, is not the situation in this case for the defaults on the one hand and the alleged antitrust violations on the other are separate and distinct. The Fifth Circuit's opinion hardly conflicts with *Milsen*. Indeed, it is totally consistent with *Milsen* and the decisions of this Court in *Kelly* and *Bruce's Juices*. The alleged conflict is not even apparent, let alone real.

POINT II

THE PETITION SHOULD BE DENIED BECAUSE THE ACTION BEFORE THE NORTH CAROLINA STATE COURTS AND THE PROPOSED ACTION IN THE KENTUCKY STATE COURTS ARE NOT SHAM LITIGATIONS.

Because of its disposition of the issue based on its finding, after a full review of the record, that the amounts Petitioners owe to Leasco do not stem from the purported antitrust claims the Fifth Circuit did not have to decide if to enjoin the North Carolina lawsuit and the proposed Kentucky lawsuit would violate this Court's holding in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S.Ct. 523, 5L.Ed.2d 464 (1961) and its progeny.

Petitioners suggest Pet. p. 13 that the Fifth Circuit did not consider the "inherent elements" of the purported antitrust violations. To the contrary, the Fifth Circuit's opinion clearly reflects a full study of the record. Petitioners would compel the Fifth Circuit to list in its opinions each and every instance it discards a frivolous claim. That has never been the rule for courts are obliged only to treat seriously those claims deserving discussion. In any event, Petitioners make no claim that the Fifth Circuit's finding that the debts owed were legitimate and did not stem from purported violations of the antitrust laws is clearly erroneous. That failure alone bars their attempt to have this Court go through the entire record *de novo.*

Even were the Fifth Circuit's finding clearly erroneous, which it is not, the Petition should not be granted. To continue the injunction would deprive Respondent of its access to state courts to speedily litigate their common law claims. In *Noerr* this Court held that recourse to legislative and administrative branches of government do not violate the antitrust laws unless they were a sham. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512, 517 (1972), *Noerr* was expanded to cover recourse to agencies and to courts and the "sham" test was defined to mean "without probable cause and without regard to the merits of the cases". In *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379 93 S.Ct. 1022 (1973) the sham test was held to embrace instigation of litigation for the purpose of delay or to retain a monopolistic position.

Here, Leasco was exercising its right to obtain money the Defendants owed to it. The North Carolina litigation and the proposed Kentucky litigation obviously had prob-

able cause for they were based on accounts stated. Moreover, the North Carolina litigation was brought seasonably and, had it been brought later, Plaintiffs might have had the defense of laches. Thus, it was not a sham and therefore not violative of the antitrust laws.

To continue the injunctions would have violated this Court's holdings in *Noerr*, *California Motor Transport Co.* and *Otter Tail* by depriving a party of legitimate access to the Courts. It would also have continued the manifestly unfair position of allowing Petitioners to continue to use Leasco's equipment, its expertise, its name and reputation and its service, all without paying for them. The Petition for Writ of Certiorari should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied in all respects.

Respectfully yours,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was hand-delivered on the 15th day of November, 1974 to Joseph W. Womack, Esquire, Attorney for Petitioners, 9th Floor, Dade Federal Building, 101 East Flagler Street, Miami, Florida, 33131.

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